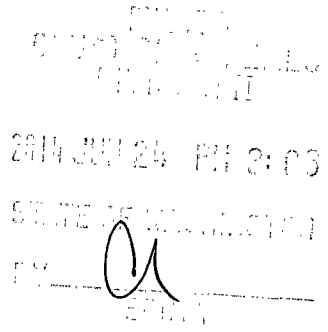

No. 45615-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

HISTORICAL MILITARY SALES INC (UBI: 602078140)
and DAVID ROBINSON,

Appellants,

vs.

CITY OF LAKEWOOD,

Respondent

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

RULES

STATE CASES

I. INTRODUCTION

Superior courts have subject matter jurisdiction to review decisions by unelected city hearing examiners. Specifically, superior courts may review such decisions by statutory and constitutional writs of review, and in some limited instances under the Washington Administrative Procedures Act. Furthermore, superior courts have subject matter jurisdiction to determine the constitutionality of a search and seizure by Lakewood Police and federal agencies under the Washington Uniform Declaratory Judgments Acts, the Washington State Constitution, and the United States Constitution, and also under 42 USC 1983. To the extent the Superior Court's subject matter jurisdiction is questioned in the above instances the question is simply: are those the "types of controversies" the superior courts adjudicate.

A brief description of the background for this appeal make clear that the type of controversy brought to the superior court below was well within its most fundamental subject matter. This is a case where local, federal, and military law enforcement officers initiated an investigation that resulted in mass confiscation of a number of items (the vast majority of which were not on the *judicially issued* search warrant) and ultimately was the basis for the revocation of the property, including the business license, of the Appellants. An "appeal" to a Lakewood City Hearing

Examiner was fruitless and orchestrated without Lakewood producing any physical evidence. Appellants objections to the illegal search and seizure in that "appeal" were expressly not considered, and the revocation of Appellants' business license was "affirmed."

A primary argument by the City of Lakewood ("Respondent") below and on appeal appears to be: The Washington Administrative Procedures Act ("APA") does not apply, and failure to comply with the APA divests the superior court of subject matter jurisdiction. This is a fallacy – if the APA doesn't apply, then its requirements do not apply. Furthermore, as discussed in Appellants' opening brief, service of process issues are *not subject matter limitations.*

CR 15 allows a party to amend a complaint as a matter of course any time before a responsive pleading is filed. Here, a responsive pleading (the motion to dismiss) was filed, and the Appellants thereafter filed a motion to amend under CR 15. An interesting hypothetical situation relevant to this case is: if the Appellants had originally filed the same petition as initially filed, but then subsequently, before any response by Lakewood, filed the proposed amended complaint, wouldn't CR 15 require the superior court to accept that amended complaint?

II. SUMMARY OF ARGUMENTS

A superior court's subject matter jurisdiction is generally beyond dispute. The subject matter jurisdiction of the superior courts is very broad, and only those "types of" controversies that the court does not entertain are outside the scope of the subject matter jurisdiction of the courts. All other defects, such as a service of process argument contained in this dispute, concern something other than subject matter jurisdiction. Superior courts do adjudicate the type of controversy presented below. Thus because the superior court below did have subject matter jurisdiction it did have the authority to decide the Appellants' motion to amend the complaint adding those legal theories that most properly address Appellants concerns. The matter should be remanded to the superior court with instructions to consider Appellants' motion to amend the complaint, and with instructions to recognize that the superior court has subject matter jurisdiction.

III. ARGUMENT

A. RCW 34.05.542 Does not Restrict the Subject Matter Jurisdiction of the Superior Court for a Statutory Writ of Review or a Declaratory Action

Respondent devotes significant argument to attempting to show that compliance with the timing requirements of that statute remove

the subject matter jurisdiction of the court. Respondent's Brief 6-10. However, the statute is not a limitation on the subject matter jurisdiction of superior courts. The statute makes no such attempt to limit the subject matter jurisdiction of courts, but merely requires that service and filing occur within 30 days of an administrative order being reviewed.

In support Respondent references Seattle v. Public Employment Relations Com, 116 Wn.2d 923 (1991). A case where the City of Seattle initiated an administrative appeal under the Washington Administrative Procedures Act, and sought to maintain that action after failing to serve all the required parties within the 30 day statute of limitations.

First, that case was decided before Marley v. Department of Labor and Industries of State, 886 P.2d 189, 125 Wn.2d 533 (1994) made it clear that subject matter jurisdiction cannot be confused with a court's "authority to rule in a particular manner. Id. at 539. Marley, the Washington Supreme Court case most fundamentally defining what is and is not subject matter jurisdiction, "underscore[d] the phrase 'type of controversy' to emphasize its importance." 125 Wn.2d at 539. The Court recognized definition for subject matter jurisdiction must

maintain its "rightfully sweeping definition." Id. The relatively straight forward analysis for whether a court has subject matter jurisdiction is simply whether the "type of controversy is within the subject matter jurisdiction" of the court and all other issues relate to "*something other than subject matter jurisdiction.*" Id. (emphasis added) (cited approvingly in ZDI Gaming Inc. v. State ex rel. Washington State Gambling Com'n, 268 P.3d 929, 173 Wn.2d 608, 618 (2012)). Respondent wholly ignores this subsequent controlling case at the heart of Appellants' opening brief.

Second, Seattle v. Public Employment Relations Com, 116 Wn.2d 923 (1991) has little in common with the instant dispute. That case rightfully was sought to be brought under the requirements of the Washington Administrative Procedures Act, and no amendment toward another legal theory was sought.

Brief of Respondent at 14 claims that "the service requirements of RCW 34.05.542 [are] *indisputably jurisdictional.*" However, that issue is vigorously disputed herein and in Appellants' opening brief. A fair, but overly simplified, issue statement of this entire appeal could be: are the service of process requirements under RCW 34.05.542 limitations on the subject matter jurisdiction of a superior court in these circumstances.

B. An Appellate Jurisdiction Analysis is not the same as a Subject Matter Jurisdiction Analysis

Respondent argues, properly in part, that where a court lacks subject matter jurisdiction, it cannot entertain the action and the matter should be dismissed as the only option, and because Lakewood was served more than thirty days after the Lakewood City Hearing Examiner's decision, dismissal without prejudice was the only option. Brief of Respondent 12 (citing Shoop v. Kittitas County, 149 Wn.3d 29 (2003)). Respondent relies on the APA as both controlling and not applicable in so doing.

It is important to recognize a distinction sometimes made between "original" and "appellate" jurisdiction of courts. See Seattle v. Public Employment Relations Com, 116 Wn.2d 923 (1991) ("By failing to serve its petition with the 30-day time limited . . . the City has failed to invoke the Superior Court's *appellate jurisdiction*). Where a party fails to have *appellate jurisdiction*, however, does control whether subject matter jurisdiction exists. A superior court may lack appellate jurisdiction because an APA review action is not filed and served within thirty days of the administrative decision, but superior courts simply always have subject matter jurisdiction of APA reviews because they are a "type of controversy" that the superior courts entertain. See RCW 34.05.514. Thus, although a court that lacks subject matter jurisdiction must dismiss

the matter without prejudice, a court that lacks appellate jurisdiction would have no such limitation and could dismiss with prejudice, allow amendments, proceed as a general jurisdiction court, or make other appropriate rulings.

Respondent relies on Cmty Invest's, v. Safeway Stores, 671 P.2d 289, 36 Wn.App. 34 (Wash.App. Div. 2 1983) for an out of context claim that a court lacking jurisdiction lacks jurisdiction to authorize an amendment. That case, however, was a special statutory proceeding initiated under the unlawful detainer jurisdiction of the trial court and commenced before the expiration of a 20 day notice to vacate. See 36 Wn.App. at 37-38. The court recognized the, very longstanding proposition, that the "statutory unlawful detainer action is a summary proceeding unknown to the common law. The provisions governing the time and manner of bringing an unlawful detainer action are to be strictly construed . . . because [the plaintiff] commenced its action on the 19th day, its suit was premature; the superior court never obtained [unlawful detainer] jurisdiction" or personal jurisdiction. Id. at 38 (internal quotations omitted). The actual reasoning from the court was that the plaintiff's "later filing of an amended complaint[1] could not undo the earlier commencement of the action." Id. at

[1] The complaint alleged a breach of a 10 day notice, but a 20 day notice was required to be given. Id. at 36. However, the complaint was served on the 19th day.

37 (referencing CR 15 (c))[2]. The case is also quite different insomuch as the cause of action hadn't accrued until *after* the complaint was filed.

A different result was reached in Herr v. Herr, 35 Wn.2d 164, 166 (1949) where the court permitted amendment to confer jurisdiction. In Herr the wife filed an original general jurisdiction action (as opposed to an unlawful detainer jurisdiction action found in Cmty Invest's, v. Safeway Stores) for separate maintenance without pleading facts sufficient to grant the court jurisdiction to grant a divorce. Id. at 165. The issue was whether a complaint may be amended "when the original complaint for separate maintenance did not state facts sufficient to give the court jurisdiction to grant a divorce, but where the amended complained did." Id.

The instant dispute is not brought under a special statutory summary proceeding with over a century of jurisprudence indicating strict adherence to procedure. This action may have originated by invoking the Washington Administrative Procedures Act as an initial legal theory, but has quickly morphed into one seeking constitutional and equitable relief. The underlying facts in the dispute remain identical and really the primary legal difference is one of nomenclature. A petition for judicial review

[2] The reference to the relation-back rule in CR 15(c)is the only known instance where the doctrine is used offensively against a party seeking to amend pursuant to CR 15. However, Cmty Invest's, v. Safeway Stores does not provide any substantive discussion of why it references CR 15(c).

under the APA versus a petition for a writ of review is substantively not that different: an inferior officer, board, tribunal, etc. that was not a court of law exercised its authority contrary to law. On its merits this case involves a small shop owner being subjected to an illegal search by federal, state, and local law enforcement officers undertaking a *criminal investigation.* The Appellant then had its license revoked without any opportunity for a hearing, but undertook an appeal to a contracted attorney Hearing Examiner (who is not accountable to any voter) that exercised "legislative" powers, refused to hear any constitutional issue, and who issues decision "which are final" with no opportunity to appeal to the elected legislative body (city council). See LMC 1.36.110 (D) (determining business license decisions are final). The very suggestion that this action was not timely commenced by filing less than 30 days after the city hearing examiner's decision and that more should have been required by the Appellants is distortion of justice – it is a plea for form over substance that fails to demonstrate that the form was insufficient.

C. Respondent Mischaracterizes the Sufficiency of Appellants' Underlying Complaint

Respondent provides an excellent cross reference of the APA and RAP requirements. Brief of Respondent 15-16. However, the statement that the underlying proposed amended complaint "does not address any of

these content-based procedural issues" under RAP 5.3 or RAP 10.3 is misleading. Id. at 15. Indeed it appears that the contrary is true: Appellants address and satisfy all of the purported "content based procedural" rules.

As a starting point, compliance with the RAPs is always tempered by RAP 1.2(a) which provides that the "rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits . . . issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands." The rules should be followed and the "ordinary" result of a failure to comply is a sanction. RAP 1.2 (b).

For an unknown reason Respondent's claim, at page 16, that the underlying complaint does not include the name and mailing address of Historic Military Sales or David Robinson name or attorney contact information in the complaint. To the contrary the attorneys address is encapsulated on literally every page in the footer. See CP 34-40. The identity of the Plaintiffs/Appellants is very expressly provided at CP 34-35. Lakewood is identified at CP 35. The issue and underlying facts sought to be reviewed is described throughout the entire proposed complaint. Appellants similarly, and quite expressly included a "request for relief" section that detailed numerous requested orders. CP 39-40.

D. CR 15 Allows Amendment Here

Pertaining to the merits of CR 15, which have been significantly briefed already, need only be shortly addressed here.

First, Respondent claims that allowing amendment would not apply due to "inexcusable neglect.[3]" Brief of Respondent 17. The Washington Supreme Court has expressly recognized that "[t]he inexcusable neglect rule does not apply to amendments adding claims" and applies only to adding new parties. Stansfield v. Douglas County, 43 P.3d 498, 146 Wn.2d 116, 122 (2002).

Second, reliance on City of Tacoma v. Mary Kay Inc. 117 Wn.App. 111, 70 P.3d 144 (2003) is misplaced. The court there the specifically defined issue was "whether Tacoma was entitled to a trial de novo" by filing an appeal as provided in the Tacoma Municipal Code. 117 Wn. App at 114. When a court specifically states the limited issue before it, it is incorrect to claim dicta as binding, and also incorrect to read the court's allegedly implied rulings as law. In Mary Kay the court correctly found

[3] Argument pertaining to whether the amendment would be futile or not and whether excusable neglect applies are trial court issues on remand to consider the merits of Appellants motion to amend. The futility argument is that service of a writ of review on opposing parties must be done within 30 days. However, if, as Respondent argues, RAP governs writs of review then RAP 5.4 provides that "fauilure to serve a party with notice . . . does not prejudice the rights of the party seeking review, but *may* subject the party to a motion . . . to dismiss the appeal if not cured in a timely manner." In short – file first and serve later under the RAPs is disfavored (albeit likely very common) but is not ordinarily a basis for a dismissal unless the party seeking review refuses to ever serve the opposing party.

that the Tacoma Municipal Code's ordinance provided "notice of appeal" did not confer original jurisdiction on the court, but recognized that the filing of a complaint would. Id at 115-16 (specifically looking to CR 3 as applicable). In that case, unlike the instant dispute, a motion to amend was never brought. The City of Tacoma merely filed and relied upon on a "notice of appeal" as provided in the Tacoma Municipal Code. See id. at 115.

Respondent attempts to argue that Mary Kay contained an "[i]mplicit" holding that an "improperly filed notice of appeal would not be treated as a substitute for another vehicle to obtain review" because the Court did not remand the matter "for further action, such as allowing Tacoma the opportunity to comply with the applicable statutory requirements." Brief of Respondent at 18-19. Mary Kay only stands for the unremarkable principal that a municipal ordinance does not modify the original jurisdiction of Washington Superior Courts.

Third, Respondent references law it recognizes as invalid by citing to Hill v. Withers, 55 Wn.2d 462 (1960), for the proposition that "an amended complaint [that] abandons a former theory or cause of action, it does not relate back to the original complaint." 55 Wn.2d 467. However, Olson v. Robers & Schaeffer Co., 607 P.2d 319 (Div. 2 1980) recognized that Hill was "correct at the time the [opinion was] issued, no longer

represent this state's rule on the relation back of amendments." 607 P.2d at 320. See also North Street Association v. City of Olympia, 96 Wn.2d 359, 635 P.2d 721, 725 (1981) (recognizing Withers was based on a modified court rule, and is no longer good law).

E. The Appropriate Standard of Review Here is De Novo.

Respondent argues that the standard of review here "implicates two standards of review." Brief of Respondent 13. This is incorrect. The standard of review for a subject matter jurisdiction ruling is always de novo. Dougherty v. Dep't of Labor & Indus., 150 Wn.2d 310 (2003).

Here the trial court dismissed the matter Lakewood's motion based *purely* on its findings that it lacked subject matter jurisdiction. The trial court expressed that "[i]t makes sense to deny the motion [to dismiss], but the law says I should grant the motion . . . I don't think I have jurisdiction here." 1 RP 12. The court expressed its reservation in dismissing the matter as based, at least in part, on "judicial economy and everything else and what I think makes sense." 1 RP 12. However, the judge indicated that "the problem" was that he believed the law did not provide for subject matter jurisdiction. 1 RP 12. In its written order it expressly denied the motion to amend "as moot." CP 45-46; see also 1 RP 2-3 (the court indicating the dismissal motion is dispositive of the motion to amend). It

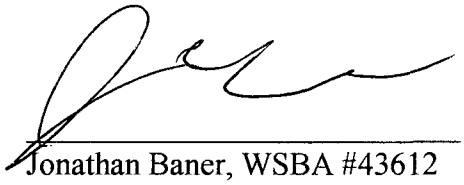
was not otherwise considered on its own merits. On remand the superior court should be instructed to consider the motion on its merits.

IV. CONCLUSION

Whether a court has subject matter jurisdiction to is a question of whether it is the "type of controversy" the court entertains. This case presents an issue of whether a superior court has subject matter jurisdiction to review a decision by an unelected legislative "hearing examiner" who affirmed a summary revokcation of a business license by Lakewood. Further it questions whether a superior court has subject matter jurisdiction to declare a search by law enforcement to be in violation of the Constitutional rights of the Appellants.

Clearly, those are the types of controversies that superior courts are designed to hear. Writs of review are both statutorily and constitutionally provided for. Judicial review of administrative decisions are statutorily provided for. Declaratory actions concerning illegal search and seizure are statutorily provided for. Determining whether a search by police is constitutionally deficient is, essentially, a question of whether the Courts are the branch of government tasked with interpreting the United States and Washington constitutions. They are.

DATED this 24th day of June 2014.



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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing on:

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By the following indicated methods:

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The undersigned hereby declares under penalty of perjury under the laws of the state of Washington that the foregoing statements are true and correct.

EXECUTED this 24th day of June 2014.

Jonathan Baner WSBA: 43612